BILL

U.S. Constitution

- 3 branches of government (environmental lawsuits!)
- 7 original articles
- 27 amendments
  - Bill of Rights constitutes the first 10 amendments
    - Protect the "natural rights" of *liberty*, *property*

Important Constitutional Elements that provide foundation for environmental protection

Article One

Commerce Clause – "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes…"

- permits regulation at interstate level to homogenize regulations
- establishes regulation of air, water, migratory birds…

Article Four

Property Clause – "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

- provides US gov't power over its own public lands and water resources

Important Constitutional Elements that provide foundation for environmental protection

Article Six

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

- *Provides for federal preemption…*

Important Constitutional Elements that provide foundation for environmental protection

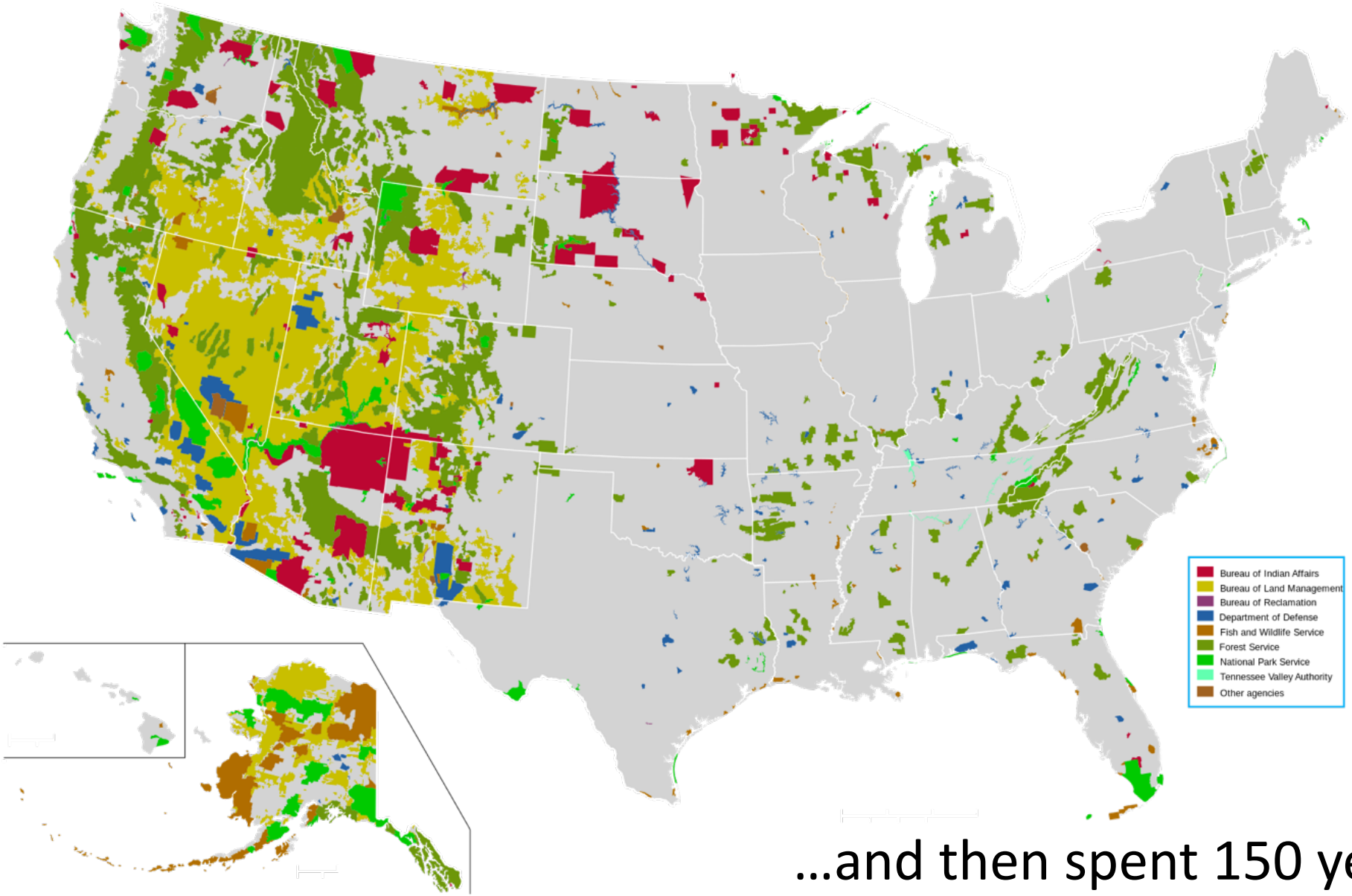
Fourteenth Amendment:

- Equal protection – foundation of Environmental Justice protection…

  … but also the argument for protecting all citizens, in whatever state they live – consistency.

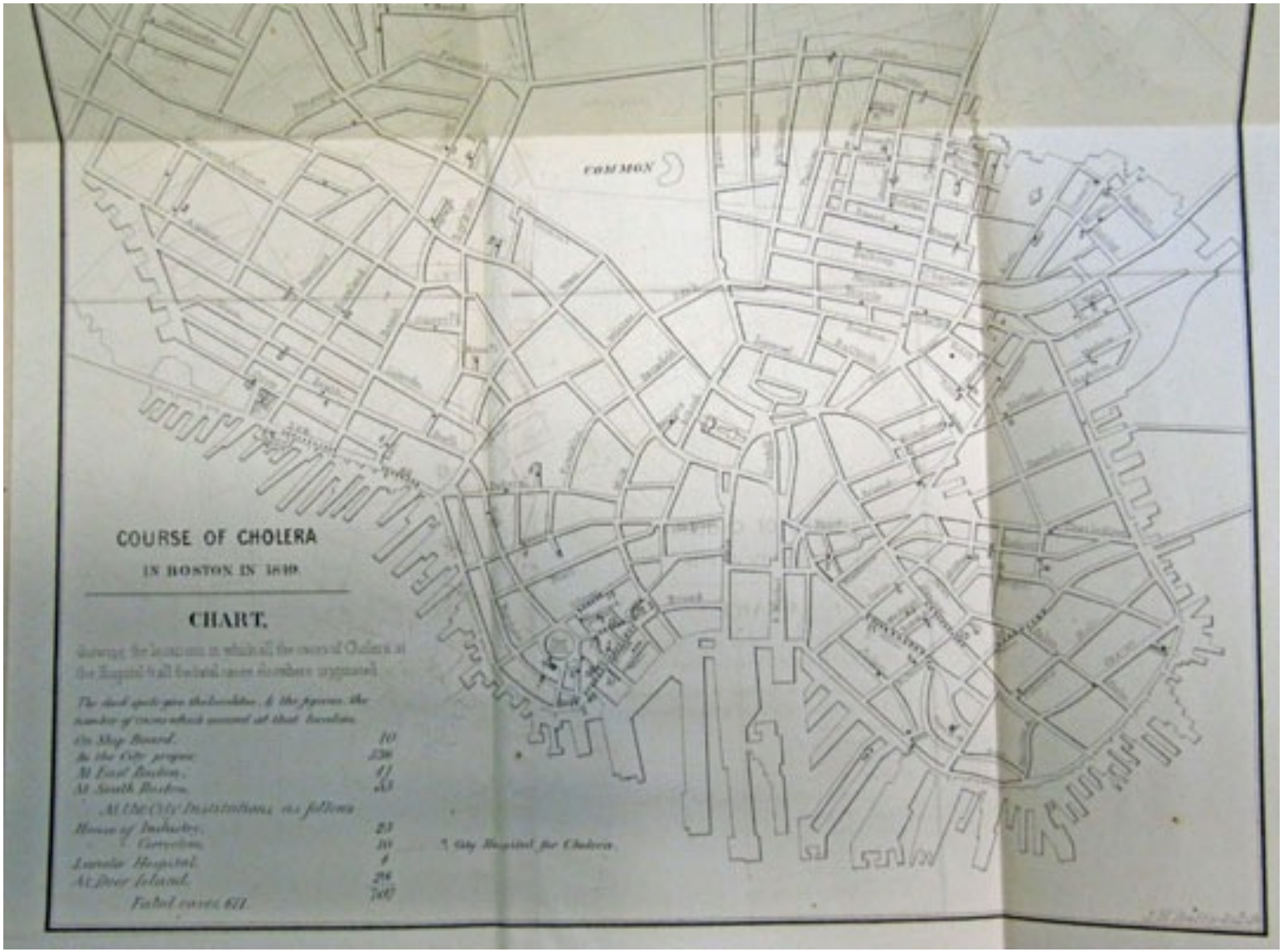
…now what?

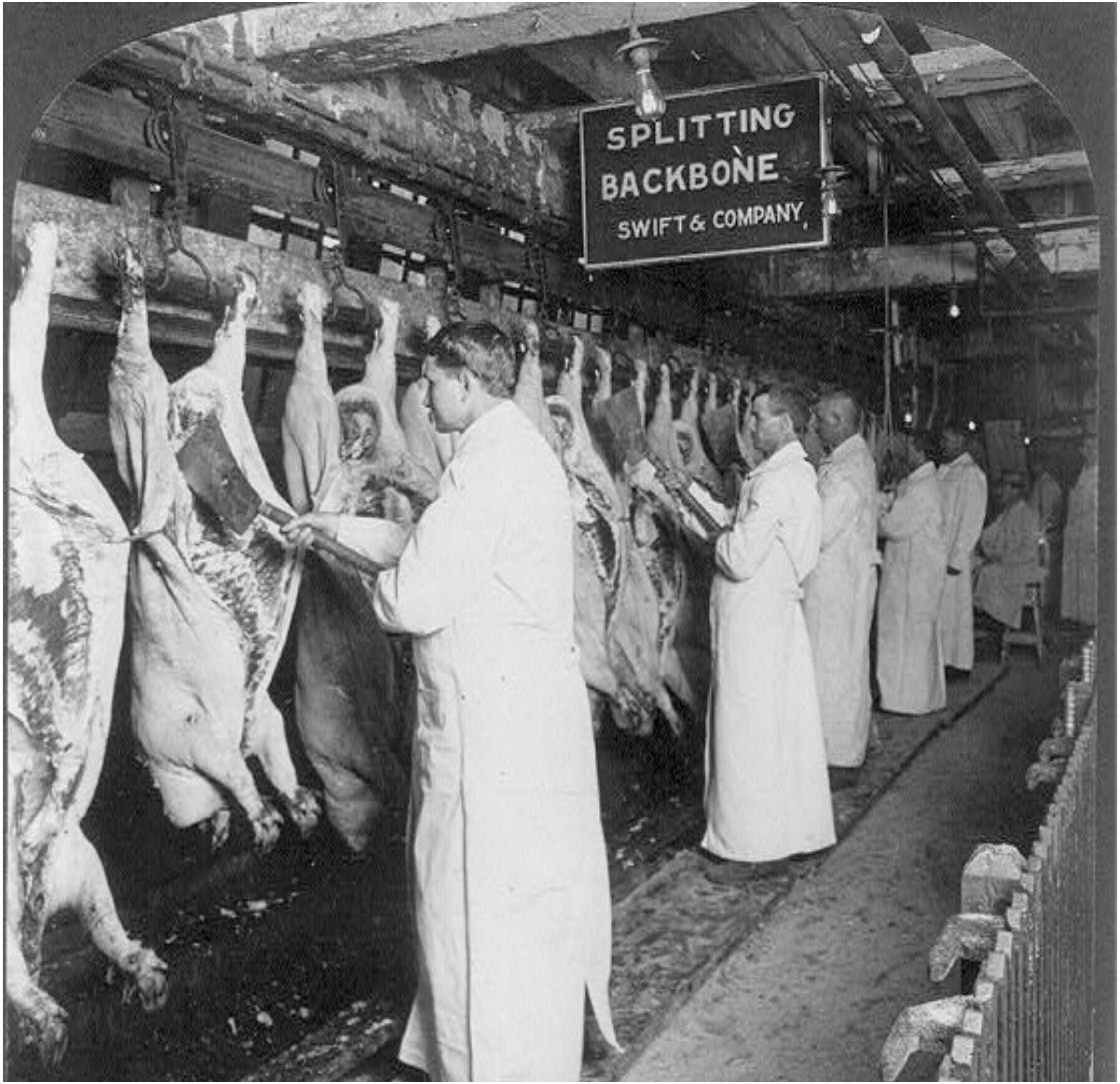
Oh give me land lots of land…



…and then spent 150 years
pretty much just regulating the land.

Course of Cholera in Boston - 1849




SPLITTING
BACKBONE
SWIFT & COMPANY

Union Stockyards in Chicago, early 1900s

Early 1900's - Government Response on Urban Health

- Public Health
  - Uncoordinated
  - Incremental
  - Mostly local (city-level)
  - Growing use of science
- What infrastructure should be built?
- Who should pay for it?
- Spurred new professions, like sanitary engineers
- American Public Health Association (1872)

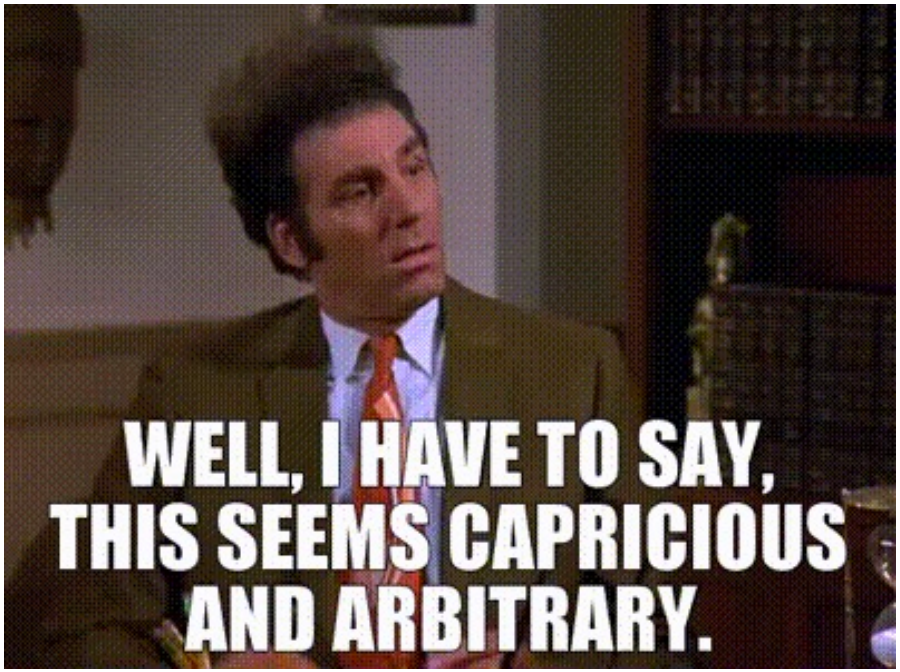
Administrative Procedures Act

- Growing number of federal administrative agencies passing regulations, acting in a judicial capacity
- APA passes in 1946 and governs how agencies of U.S. federal government may propose and establish regulations (a way to rein in agencies through procedures that make them accountable).
  - Agencies are required to keep public informed of their organization, procedures and rules
  - Requires public participation in rulemaking process
  - Establishes uniform standards for the conduct to formal rulemaking and adjudication
  - Defines scope of judicial review

APA and “arbitrary and capricious” - 5 U.S.C. § 706

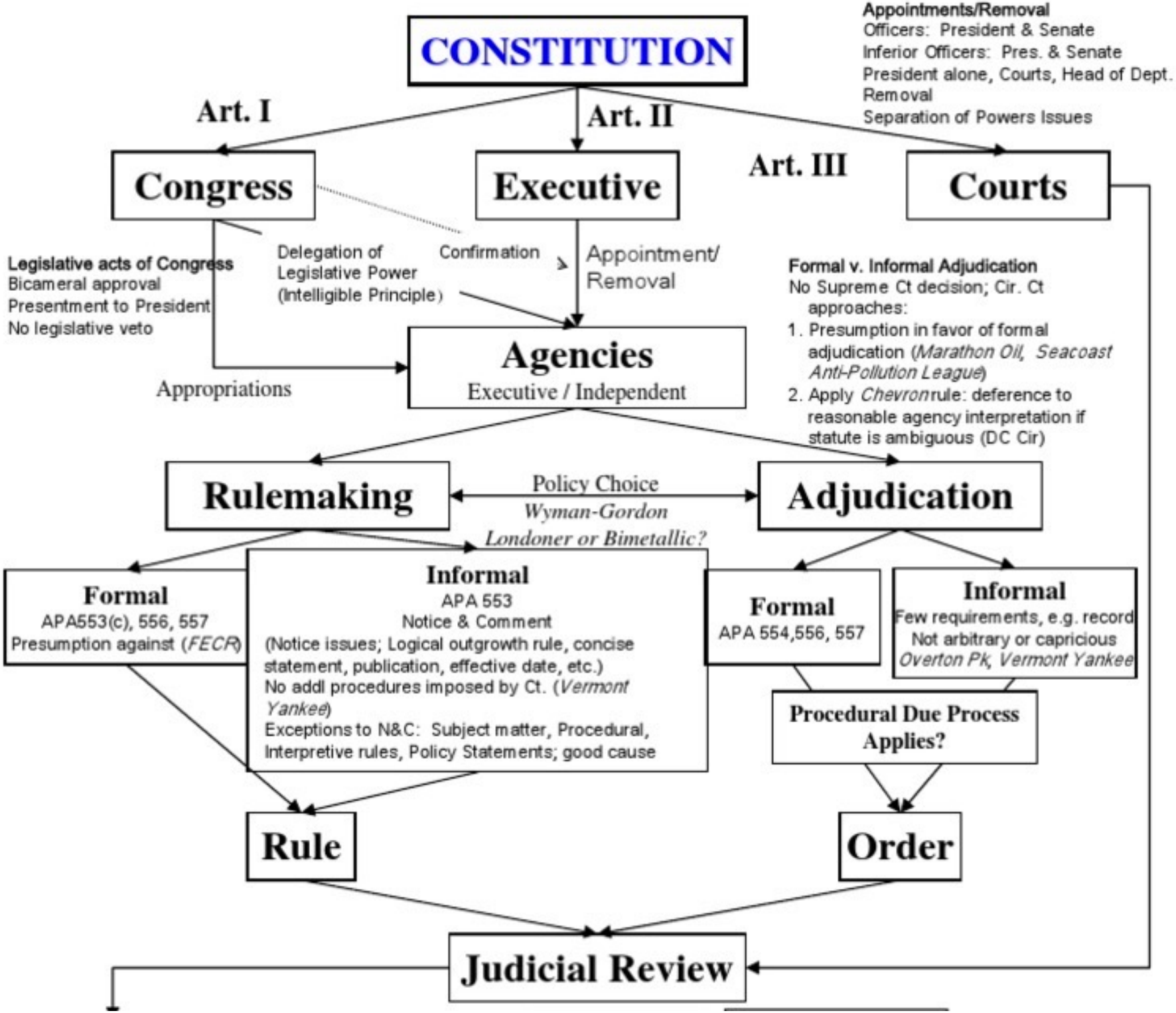
The reviewing court shall—**(1)** compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—**(A)**arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;



Court Circuit for Appeals

- Administrative Law Judge of the agency (considered to be part of the executive branch, not the judiciary, but the APA guarantees decision independence, and immunity; operate similarly to trial judges.)
- U.S. District Court
- U.S. Circuit Courts of Appeals
- U.S. Supreme Court


CONSTITUTION
Art. I
Art. II
Art. III
Congress
Executive
Courts
Appointments/Removal
Officers: President & Senate
Inferior Officers: Pres. & Senate
President alone, Courts, Head of Dept.
Removal
Separation of Powers Issues
Legislative acts of Congress
Bicameral approval
Presentment to President
No legislative veto
Delegation of Legislative Power (Intelligible Principle)
Confirmation
Appointment/ Removal
Appropriations
Agencies
Executive / Independent
Formal v. Informal Adjudication
No Supreme Ct decision; Cir. Ct approaches:
1. Presumption in favor of formal adjudication (Marathon Oil, Seacoast Anti-Pollution League)
2. Apply Chevron rule: deference to reasonable agency interpretation if statute is ambiguous (DC Cir)
Rulemaking
Policy Choice
Wyman-Gordon
Londoner or Bimetallic?
Adjudication
Formal
APA553(c), 556, 557
Presumption against (FECR)
Informal
APA 553
Notice & Comment
(Notice issues; Logical outgrowth rule, concise statement, publication, effective date, etc.)
No addl procedures imposed by Ct. (Vermont Yankee)
Exceptions to N&C: Subject matter, Procedural, Interpretive rules, Policy Statements; good cause
Formal
APA 554,556, 557
Informal
Few requirements, e.g. record
Not arbitrary or capricious
Overton Pk, Vermont Yankee
Procedural Due Process Applies?
Rule
Order
Judicial Review

Quick Survey!

Where does the Judicial Branch's authority to determine the constitutionality of laws or acts by the other branches of government come from?

A. The Constitution
B. Act of Congress
C. Delegation of Executive authority
D. They made it up themselves

Article III

Section 1.
The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . .

Section 2.
The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Marbury v. Madison (1803)

Early Days – Court "sits in a dank potato hole"

Only 6 justices, because no one cared if the court split.

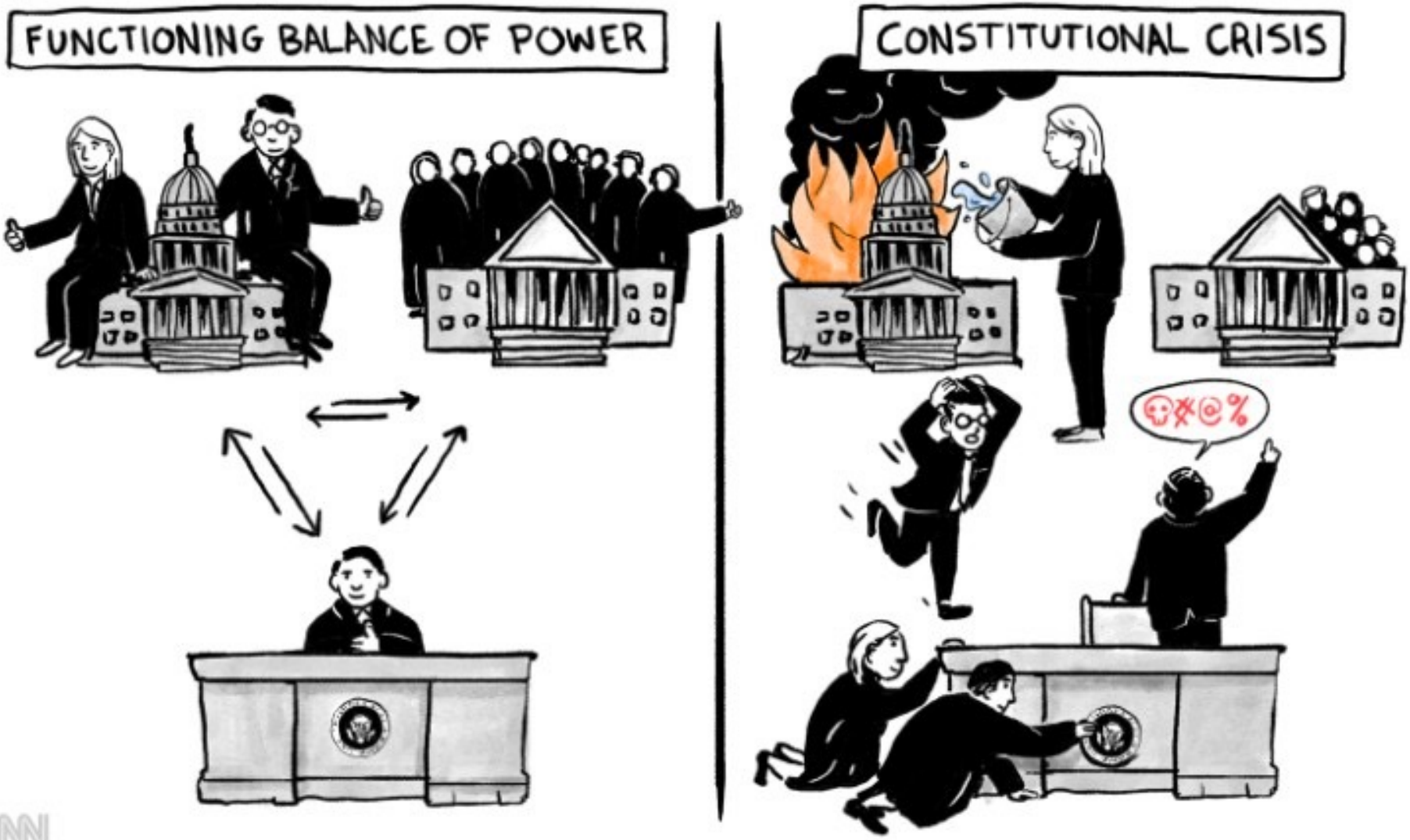
- Justices physically travelled around the U.S. to hear cases

John Adams and Federalists swept out of power – in comes Jefferson.

- Adams packs courts with federalist picks and installs John Marshall as Chief Justice
- *BUT*, some of the commissions aren't delivered in time before Jefferson takes office.
- William Marbury challenges Jefferson in court to get his judicial commission. *Goes straight to Supreme Court.*
- Marshall's in a tough spot…

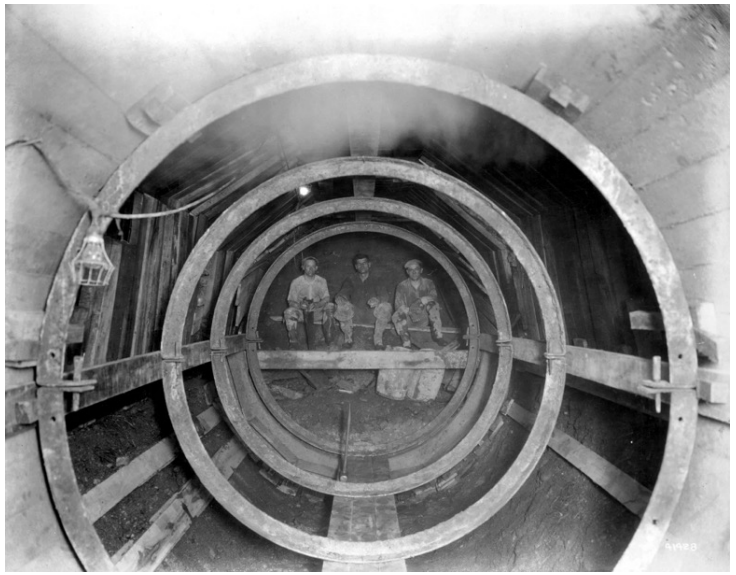
"It is emphatically the province and duty of the judicial department to say what the law is."

Marbury v. Madison (1803)

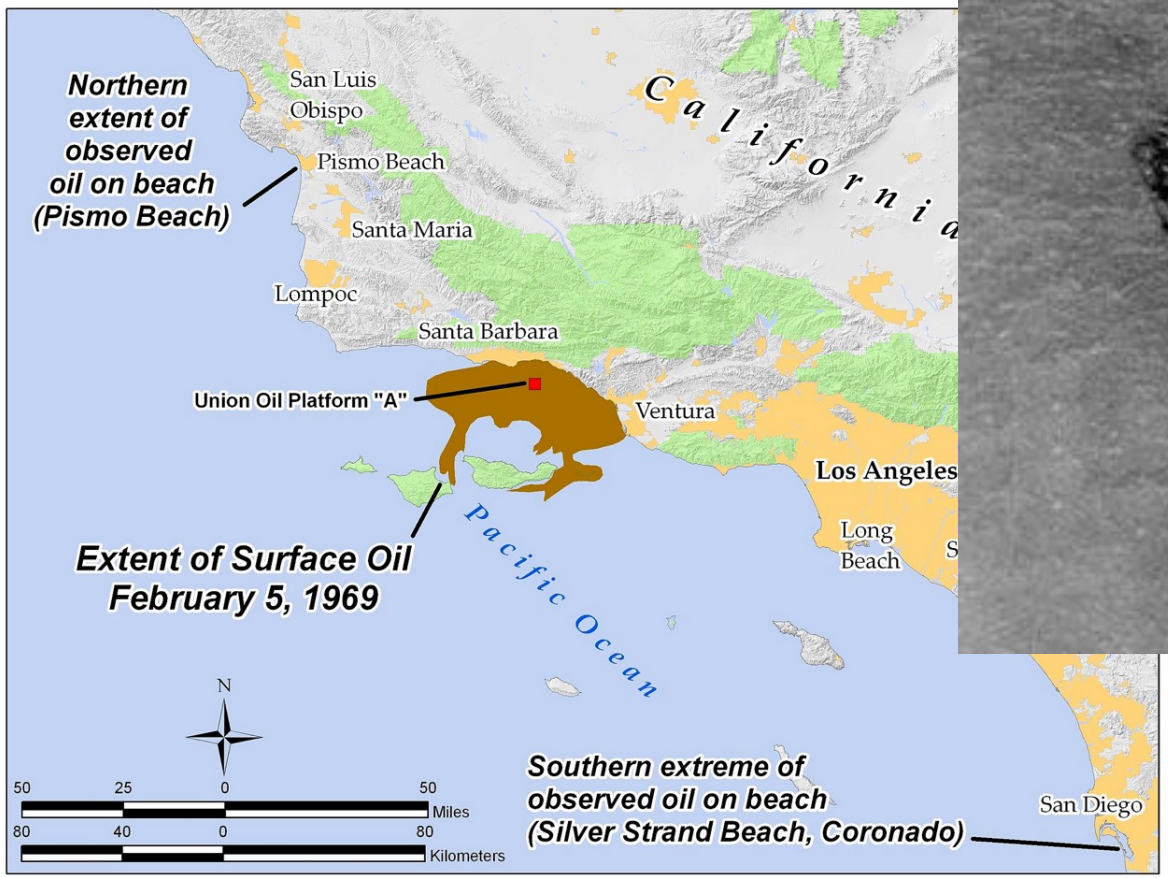

FUNCTIONING BALANCE OF POWER
CONSTITUTIONAL CRISIS
@%@%
CNN

Kennedy and Johnson lay the groundwork for Clean Air and Water Acts

- 1940's only 25% of urban sewage receives secondary treatment – only 50% gets even primary.
- Kennedy funds municipal sewage plants and develops idea of criteria pollutants
- Johnson requires secondary sewage treatment and that all federal projects and contractors reduce pollution



1969 - Santa Barbara Oil Spill



The “ecological ‘shot heard round the world’”

Earth Day 1970 – 20 million people mobilize

"All the News That's Fit to Print"

The New York Times

LATE CITY EDITION

VOL. CXIX ... No. 40,527 NEW YORK, THURSDAY, APRIL 23, 1970 10 CENTS

PRICES CLIMB 0.4% BUT RATE OF RISE APPEARS TO SLOW

Gain in the Consumer Index for March Lags Behind the 4 Previous Months

INCREASE IS STEEP HERE

Medical Care and Mortgage Interest Are the Major Elements in Changes

By EDWIN L. DALE Jr.

WASHINGTON, April 22—Consumer prices rose strongly again in March but there were signs that the pace of inflation was slowing, the Labor Department reported today.

After adjustment of the data to reflect normal seasonal changes, the Consumer Price Index rose four-tenths of 1 per cent in March, less than the five-tenths rise in February and the six-tenths rate of the three months before that.

What is more, one-quarter of the entire March increase in the index was accounted for

Millions Join Earth Day Observances Across the Nation

Throngs jamming 5th Avenue yesterday in response to a call for the regeneration of a polluted

CAMBODIAN CRISIS GROWS AS TROOPS SEEM TO FALTER

With Reds Near, Peacepeak Is Gloomy Over Limited Response to Aid Pleas

CIVIL AVIATION CURBED

Aide Declines to State How Long Army Can Hold Out With the Arms It Has

By HENRY KAMM

PHNOMPENH, Cambodia, April 23—An atmosphere of heightening national emergency is overtaking Cambodia.

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

"NEPA" was adopted in 1969 and has been called:

"**the Magna Carta of US Environmental Law**"

NEPA requires federal agencies to study and disclose the environmental effects of their actions and to include the public in their decision-making.

Mandates development of environmental impact statements (EISs) for "major projects" -- like power plants, roads, and bridges -- that the federal government is planning to undertake (except in emergency situations). At the heart of this review process is the agencies' obligation to consider alternatives to their original project designs – PUBLIC PARTICIPATION

NEPA and the APA - 5 U.S.C. § 706

The reviewing court shall—**(1)** compel agency action unlawfully withheld or unreasonably delayed; and

(2)hold unlawful and set aside agency action, findings, and conclusions found to be—**(A)**arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

Courts "apply the APA's arbitrary and capricious standard to a NEPA challenge." Nevada 1 v. Dep't of Energy, 457 F.3d 78, 87 (D.C. Cir. 2006).

The Olden Days…

The Olden Days…

- In the 1970's, most raw sewage was dumped into our rivers and lakes. At that time only 85 million people were served by any kind of sewage treatment plant.
- Less than 10% of U.S. watersheds were characterized as unpolluted or even moderately polluted.
- Water pollution led to record fish kills, including 26 million fish because of contamination of Lake Thonotosassa, Florida.

Clean Water Act
40th Anniversary

Federal Water Pollution Control Act

- Also known as the Clean Water Act
- Primary law for surface water protection in U.S.
- Adopted in 1972 after previous efforts proved unsuccessful.
- Overseen by U.S. Environmental Protection Agency.
- Combines previous approaches focused on either Technology or Water Quality.

CWA Goals and Milestones

"Fish Killed by Water Pollution"
Nat'l Archives and Records Admin.
Photo by Bill Gillette, U.S. EPA,
June 1972

- Goal: restore and maintain the chemical, physical, biological integrity of our nation's waters
- Milestones:
  - Achieve fishable and swimmable waters by 1983,
  - Eliminate the discharge of pollutants into navigable waters by 1985, and
  - Prohibit the discharge of toxic pollutants in toxic amounts

earth LAW CENTER

Has the Clean Water Act been successful at achieving its objectives?

Industry-specific discharge standards prevent more than 700 billion pounds of toxic pollutants/year.

EPA claims that 3,579 water bodies nationwide previously failing to meet standards now attain all uses.

National Previously Impaired Waters Now Attaining All Uses

Description of this table

NOTE: Click on the underlined "Number of Waters Attaining" value for a detailed list of those waters now attaining all uses.

Cycle Attaining	Number of Waters Attaining	Number of Causes of Impairment Addressed
2002	25	26
2003	4	7
2004	159	219
2005	107	241
2006	85	103
2007	245	458
2008	357	524
2009	361	594
2010	351	457
2011	340	455
2012	303	465
2013	389	488
2014	367	557
2015	110	188
2016	249	289
2017	127	160

Has the Clean Water Act been successful at achieving its objective?

Chesapeake Bay

- Several iconic U.S. waters significantly improved or improvement underway.

Swimmers on Charles River, Boston

Pollution Issues

Lake Erie
2011

Water Trends: United States

Impaired Waters in the United States

under Section 303(d) of the Clean Water Act

SOURCE: http://www.epa.gov/waters/ir/

Percentage of assessed rivers and streams reported to EPA as "impaired" or "threatened" water quality.

- 0% – 10%
- 10% – 30%
- 30% – 50%
- 50% – 80%
- 80%+

Pollution Issues

Ballona Creek

Chollas Creek (San Diego Coastkeeper)

Habitat Destruction

Peat Mining in a Wetland/Montane *EPA Region 8, Paul McIver*

State and Federal Roles

- “Cooperative Federalism”
- The federal government sets national standards and is ultimately responsible, but states can receive authorization to implement the program under EPA oversight.
- Today, most States (46) implement this law under authority delegated by federal government. In California, via the Porter-Cologne Act.
- State laws can for the most part be more restrictive or protective than federal requirements.

California – State Water Board and 9 Regional Water Boards

Water Quality Standards

- Water quality assessment begins with water quality standards.
- CWA Section 303(c) requires states to adopt water quality standards that protect the public health or welfare, enhance the quality of water, and serve the purposes of the CWA.
- Consists of 3 parts:
  - Designated Uses
  - Water Quality Criteria
  - Antidegradation Policy

Designated Uses

- All existing and potential uses of a waterway are identified.

Examples:

Designated Uses

- Must Protect Existing Uses
  - those uses attained on or after November 28, 1975
- Presumption that all waterbodies should be "fishable and swimmable"
  - State can prepare a Use Attainability Analysis if it believes these uses are not feasible (e.g. natural pollutants or natural low flow).
  - Economic considerations are allowed in limited circumstances. 40 CFR 131.10

Water Quality Criteria

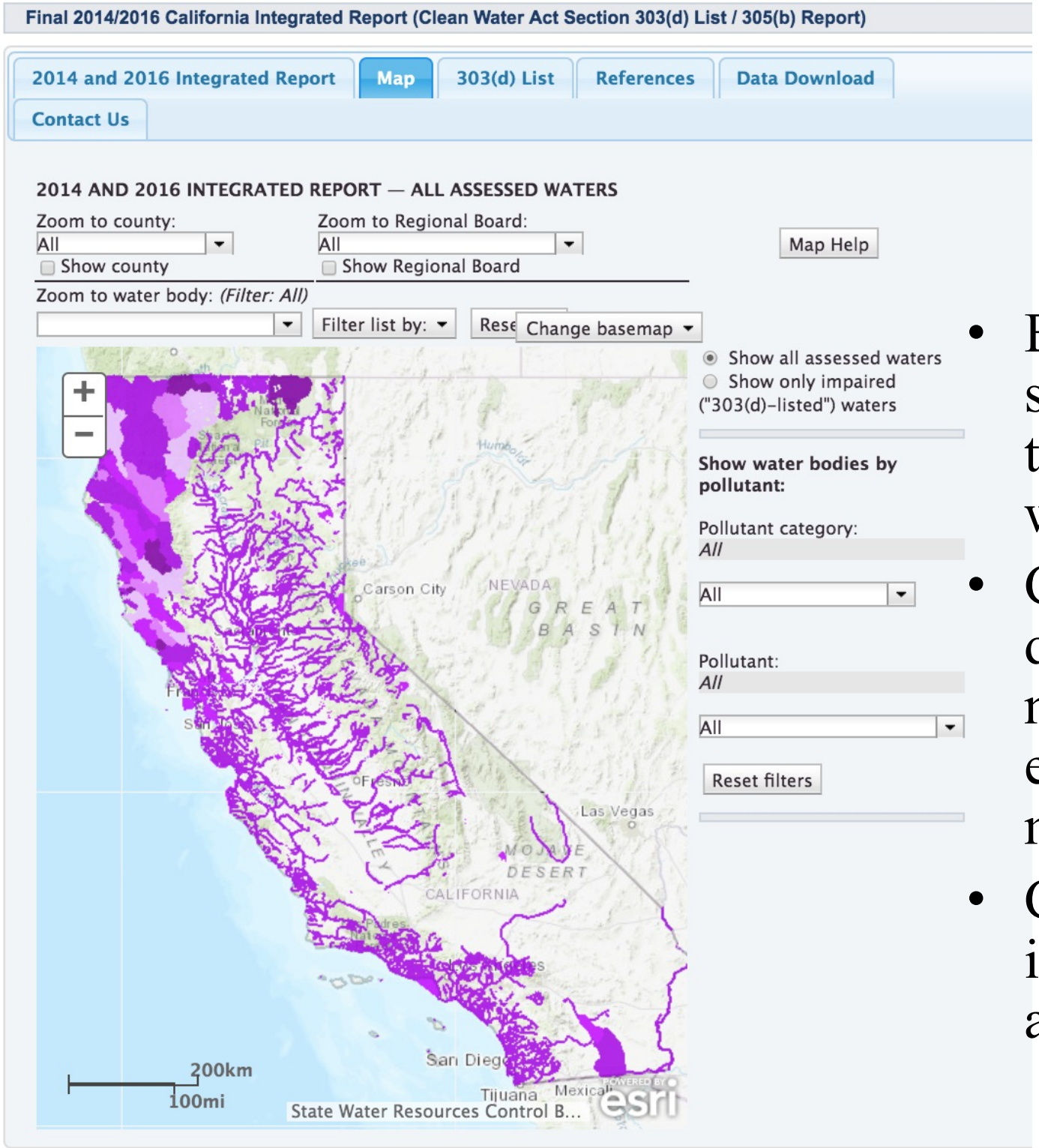
- Narrative
- Numeric
- Biological Criteria (a way of describing the biological qualities that must be present to support a desired condition in a waterbody)
- Sediment Criteria
- Wildlife Criteria
- Numeric Criteria for Wetlands

Measure Water Quality

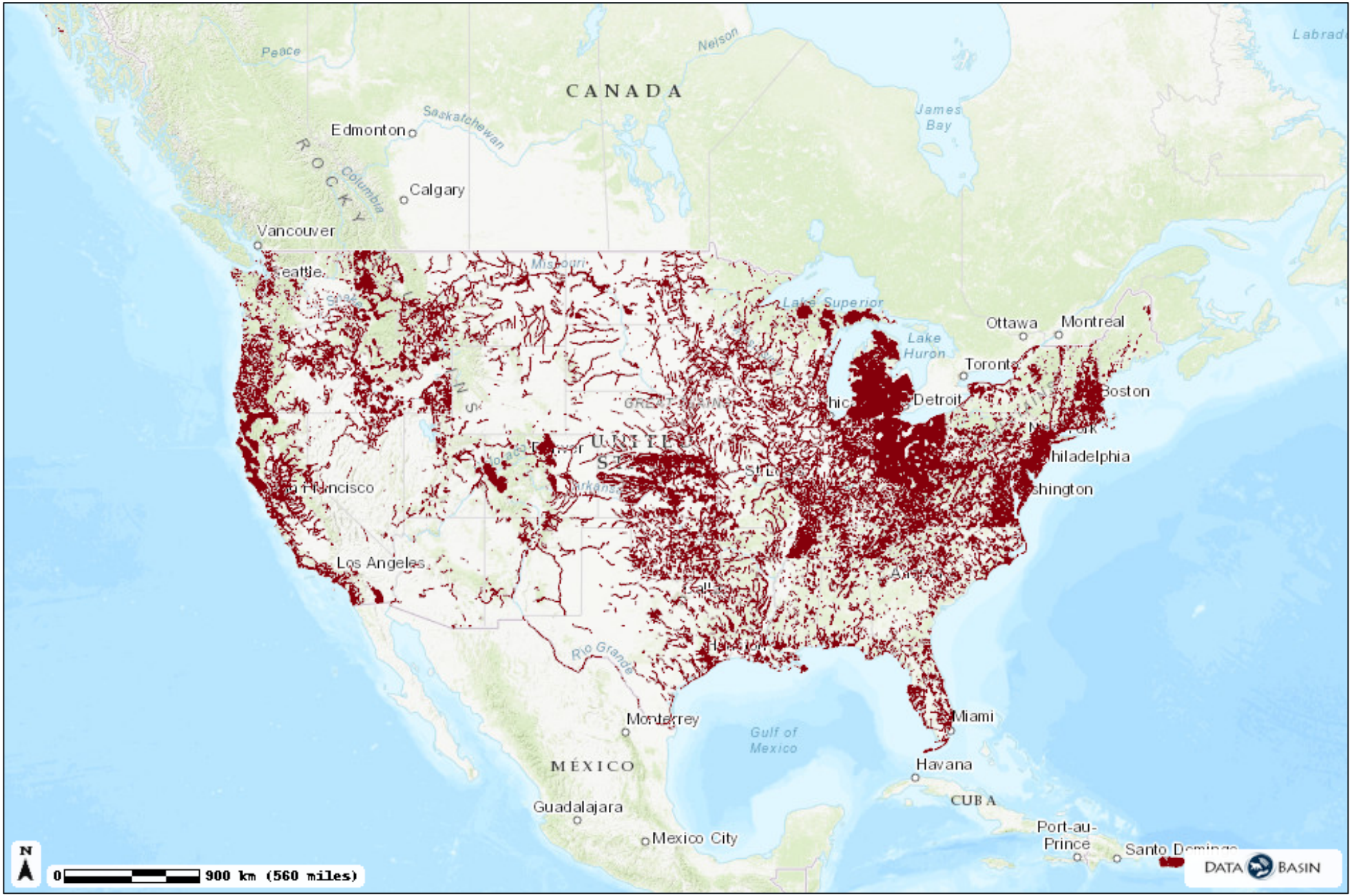
River sampling
Photo by Humboldt Baykeeper

- States must assess their waters to determine the degree to which established standards are being met, and take action where needed
- States take biological, chemical, and physical measures of their waters; sample fish tissue and sediments; evaluate land use data; and use predictive models and surveys

Monitoring Reports



- Every two years each state must report on the health of all its waters
- CWA Sec.305(b): describe quality of all navigable waters and extent to which they meet standards
- CWA Sec. 303(d): identify all impaired and threatened waters


CANADA
Edmonton
Calgary
Vancouver
Seattle
Peace
Saskatchewan
Columbia
ROCKY
Nelson
James Bay
Labrad
Missouri
Lake Superior
Lake Huron
Ottawa
Montreal
Toronto
Detroit
Boston
Philadelphia
Washington
San Francisco
Los Angeles
Las Vegas
Arkansas
Rio Grande
Monterrey
MEXICO
Gulf of Mexico
Miami
Havana
CUBA
Guadalajara
Mexico City
Port-au-Prince
Santo Domingo
N
0
900 km (560 miles)
DATA BASIN

Antidegradation Policy

- Federal antidegradation policy consists of three "tiers" of protection (40 CFR 131.12):
  - Tier I requires that water quality necessary to support existing uses is maintained;
  - Tier II requires that where water quality is better than necessary to support fishable/swimmable uses that the quality be maintained unless a lowering is necessary to allow important economic or social development; and
  - Tier III requires that water quality of Outstanding Natural Resource Waters ("ONRWs") is maintained and protected.

Clean Water Act Section 301

Discharges of pollutants/waste into waters of the United States are prohibited without a Permit

What Activities are Regulated?

- Any discharge of **pollution** from a **point source** to a **water of the U.S**.
- Pollution = any amount of human made or human induced alteration of chemical, physical, biological or radioactive integrity of water.
- Point Source = any discernible, confined and discrete conveyance.
  - Like a pipe or a channel.

What currently escapes regulation under the Clean Water Act (other than groundwater)?

A. Rain runoff in our cities
B. Rain runoff on farms
C. Discharges from powerplants
D. Discharges from sewage plants

Agricultural stormwater and irrigation return flows largely exempted (largely left to the states).